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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

**AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al.,**

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Petitioners American Society of Composers, Authors and Publishers ("ASCAP"), *et al.*,* ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on August 8, 1977.

Opinions Below

The majority and concurring opinions of the Court of Appeals, reported at 562 F.2d 130, appear as Appendix A to this petition. The opinion of the concurring judge, on a petition for rehearing, not officially reported, appears as Appendix D. The opinion of the United States District Court for the Southern District of New York (Lasker, J.), reported at 400 F. Supp. 737, appears as Appendix B.

* This petition is filed on behalf of ASCAP, as well as the individual writer and publisher members of ASCAP who were named as defendants in the complaint filed in the District Court.

Jurisdiction

The judgment of the Court of Appeals, entered on August 8, 1977, appears as Appendix C. A timely petition for rehearing was denied on December 6, 1977. On March 1, 1978, Mr. Justice Marshall extended the time to file this petition until May 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. § 26 and 28 U.S.C. §§ 1331(a), 1337 and 1338(a).

Questions Presented

For 64 years ASCAP has offered the "blanket" license to commercial users of copyrighted music—the same blanket license which is the standard license in all nations of the world which recognize copyright. Since 1941, ASCAP has been required to offer such licenses by consent decrees with the Department of Justice in *United States v. ASCAP*, an antitrust case in the Southern District of New York.

The Court of Appeals for the Second Circuit has now held in this action that the blanket license constitutes price-fixing, that it is *per se* illegal under Section 1 of the Sherman Act, and that ASCAP's members misused their copyrights merely by offering an ASCAP blanket license to plaintiff CBS for its television network.

The Court of Appeals reached this extreme result only by expanding the *per se* doctrine far beyond the bounds sanctioned by this Court and in square conflict with decisions of the Ninth Circuit.

If the decision below is allowed to stand, the sure result will be years of turmoil in the music licensing business in the United States and around the world, confusion in the

trial and appellate courts charged with administering the antitrust laws, and a flood of new litigation.

To avoid these consequences, we urge this Court to grant certiorari to decide the following questions:

1. When individual sellers are willing and free to negotiate individual prices for their individual products in individual negotiations, does their simultaneous offer of a package of all of their products through a common sales agent at a negotiated price constitute price-fixing which is *per se* violative of Section 1 of the Sherman Act?

2. More particularly, even though ASCAP's members were willing and free to license their copyrights to the CBS television network in individual negotiations, if asked, did ASCAP and its members engage in price-fixing, illegal *per se* under Section 1 of the Sherman Act, and did they misuse the members' copyrights by offering CBS an ASCAP blanket license?

3. Is the decision below in direct conflict with the decisions of the Ninth Circuit in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (1967), *cert. denied*, 389 U.S. 1045 (1968), and *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226 (1976), *cert. denied*, 430 U.S. 915 (1977), *affirming* 391 F. Supp. 962 (D. Ariz. 1975)?

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

CBS

This case concerns only the television network operated by CBS. But this is not, of course, CBS' only activity. CBS owns five local TV stations and fourteen local radio stations, it is a leading music publisher having subsidiaries which belong to ASCAP and BMI (the other major American performing rights licensor), and it is the largest manufacturer and seller of records and tapes in the world. As the District Court found, CBS is the "No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music" (App. B, p. 93a).

ASCAP

ASCAP is an unincorporated association of creators and publishers of music; it acts as a clearinghouse for the licensing of performance rights to the copyrighted music of its 16,000 writer and 6,000 publisher members—it licenses also on behalf of the hundreds of thousands of members of some 30 affiliated foreign societies.* ASCAP's members include Samuel Barber, Leonard Bernstein, Aaron Copland and Morton Gould among serious composers, and such popular composers and lyricists as Irving Berlin, Hoagy Carmichael, John Denver, Bob Dylan, Roberta Flack, Carole King, Richard Rodgers, Carly Simon and Stevie Wonder. And it represents the estates of deceased members, among them Bela Bartok, George M. Cohan, Duke Ellington, W. C. Handy, Oscar Hammerstein II, Victor Herbert, Cole Porter and John Philip Sousa.

* Similarly the affiliated foreign societies license for ASCAP members in their countries.

Virtually every aspect of ASCAP's operations is governed by the Amended Final Judgment entered on consent in 1950 in *United States v. ASCAP*, [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (amending a 1941 judgment).

Under the Amended Final Judgment and the ASCAP Articles of Association and membership agreements:

(a) membership in ASCAP is open to any writer of one published song and to any music publisher;

(b) each member grants to ASCAP only the *nonexclusive* right to license performances; the member retains the right to license directly, and ASCAP is forbidden from interfering with that right;

(c) no user may be denied an ASCAP license—indeed, a user obtains an ASCAP license by the very act of applying for one;

(d) ASCAP is required to offer users the "blanket" license, which gives the user the right to perform all of the compositions in the ASCAP repertory, as often as desired, upon payment of a stipulated fee.

Blanket licenses are used throughout the world by performance rights societies in all countries which recognize copyright. The prime virtues of the blanket license are convenience, limitless choice in performing music, and freedom from concern about infringement. It gives users unlimited access to all the copyrighted compositions written by members of the licensing society and of affiliated foreign societies—without the need to seek licenses from individual copyright owners.

The Amended Final Judgment requires ASCAP also to offer broadcasters a variant of the blanket license, the

"per program" license. Here, too, the broadcaster has unlimited access to the ASCAP repertory but, instead of paying one blanket fee, the per program licensee pays a fee only for each program in which ASCAP music is performed.*

ASCAP's fees for all of its licenses are regulated by the Amended Final Judgment in that, if a user is dissatisfied with a fee quoted by ASCAP and an agreement can not be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee." In any such proceeding, ASCAP—not the user—bears the burden of proving the reasonableness of the fee it requests.

ASCAP is in essence a cooperative. After deduction of operating expenses, it distributes all revenues among its members and the affiliated foreign societies. Distribution arrangements comply with the mandate of the Amended Final Judgment that ASCAP

"distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP."

Thus members receive royalty distributions only when their compositions are performed. There is no reward for the non-productive or the inefficient.

* As a matter of precise fact, the Amended Final Judgment requires ASCAP to issue a per program license; ASCAP is "enjoined and restrained" from issuing a blanket license unless the broadcaster so requests.

Hence, CBS and every other broadcaster which has taken an ASCAP blanket license has done so only as a result of its own voluntary act.

Proceedings Below

The District Court

As we have seen, the licensing rights which ASCAP obtains from its members are nonexclusive. In theory, therefore, neither the CBS television network nor any other user is compelled to deal with ASCAP: any user may ignore ASCAP and negotiate licenses with the members.

The principal issue tried before the District Court was whether CBS, as a practical matter, *could* obtain the licenses it desires for its television network directly from the members. Although CBS had never approached even one ASCAP member for a direct license, it sought to prove that any such effort would be futile since ASCAP members would refuse to license directly. Accordingly, said CBS, the blanket license should be condemned as block-booking and price-fixing.

The evidence at the trial destroyed CBS' factual contentions. Undisturbed findings of fact by the District Court established that CBS *could* acquire the licenses it wished in direct negotiation with ASCAP members, and that ASCAP's members *would* compete on a price basis for individual compositions if CBS sought direct licenses from them.

The District Court's findings, after an eight-week trial, were explicit (App. B, pp. 111a-112a, 115a):

"CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS's door if it announced plans to drop its blanket license.

• • •

"... CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

Turning to the legal issues, the District Court wrote (App. B, p. 40a):

"In support of its contention that ASCAP and BMI are illegal combinations merely because they offer blanket licenses, CBS cites cases in which sellers agreed among themselves as to the prices to be charged buyers for their products. See, e.g., *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811, 84, L.Ed. 1129 (1940); *United States v. Trenton Potteries, Co.*, 273 U. S. 392, 47 S. Ct. 377, 71 L.Ed. 700 (1927). The cases are inapposite. Unlike the plaintiffs in the cited cases, CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them. It makes the very different claim that a combination of individual sellers offering the entire pool of their products through a common sales agent at a negotiated package price is per se illegal, regardless whether the sellers are willing to sell their products on an individual basis.

"The claim fails as a matter of law."

The District Court's conclusion that CBS' claim failed "as a matter of law" was premised on its reading of two decisions of this Court, *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). To the District Court, these cases teach that "[T]he critical difference between an illegal licensing arrangement and a legal one is the fact of coercion or compulsion by the licensor."

Since there was no compulsion in the blanket license which ASCAP made available to CBS and other television networks on their request, since CBS had a free and real choice between dealing with ASCAP and dealing with the individual members, the District Court dismissed the complaint.

The Court of Appeals

The Court of Appeals accepted every finding of fact made by the District Court in its 46-page opinion. The Circuit Judges agreed with Judge Lasker that the proven absence of coercion disposed of any claim of illegal tie-in or block-booking. But a majority of the Court of Appeals (Gurfein & Anderson, JJ.) held that the mere offering of a blanket license by ASCAP—even though ASCAP's members were willing to deal individually and even though ASCAP was required to offer blanket licenses by the Amended Final Judgment—was an act of price-fixing as a matter of law, and so illegal *per se*. Judge Moore, in an opinion termed a concurrence, refused to agree that the blanket license was price-fixing.

In its statement of the issue, the majority made plain that its ruling had impact far beyond the music-licensing business (App. A, p. 11a):

"The charge that there is a restraint of trade by price-fixing is founded upon the conception that when *any* group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained" (emphasis added).

Disregarding the realities of the music business as revealed in the lengthy trial record, the majority reached this simple conclusion (App. A, p. 12a):

"... even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)."

The majority offered only this rationale (App. A, pp. 20a, 22a):

“... the very availability of the blanket license itself involves the fixing of a collective price which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete.

* * *

“Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete” (emphasis in original).

The Court of Appeals here made two basic errors. First, it is the user, not the member, who “chooses” whether to deal with ASCAP or the member. Second, the Court of Appeals grounded its decision only upon its *ipse dixit* that the “blanket license dulls his incentive to compete”—in preference to the undisturbed finding of the District Court that ASCAP’s members would not be “disinclined” to deal with CBS for direct licenses but, rather, “would wait at CBS’ door” (App. B, p. 112a).

As we have seen, the majority does not view its unprecedented ruling narrowly: when *any* group of sellers make their collective products available through a single agency, at a single price, they engage in price-fixing which is unlawful *per se*, even though each seller remains willing to negotiate an individual price for his product.

Having thus found price-fixing where price-fixing had never been seen before, and having extended the concept of *per se* illegality beyond all prior bounds, the majority abruptly did an about-face and created a new defense to price-fixing. It ruled that a common selling agency with a single price might be saved from *per se* illegality by a

“market necessity.” The Court did not find it necessary to analyze how the seeming antipodes of *per se* illegality and “market necessity” justification might be brought into congruence: here, said the majority, there was no “market necessity” for the blanket license because, as the District Court had found, direct dealing between CBS and ASCAP members was entirely feasible.

And so ASCAP and its members, by reason of their making the blanket license available to CBS, were guilty of price-fixing. And their problems did not end there: in a footnote, the Court said: “We dispose of CBS’ claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim.”*

The liability of ASCAP and its members thus resolved, the Court did another turnabout. Instead of enjoining the *per se* illegal blanket license, the Court said (App. A, pp. 22a-23a):

“Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing.

“We reverse the judgment dismissing the complaint and remand to the District Court for further proceedings in accordance herewith.”

The *per se* illegal blanket license may, then, perhaps still be saved if the District Court can fashion “some form

* Since March 31, 1978, CBS has been performing ASCAP music on its television network without license from ASCAP or any member—and without paying. CBS’ counsel has stated that, if sued for infringement, it will defend with a claim of “misuse” based upon the Second Circuit decision.

of per use" license to be issued by ASCAP. The Second Circuit did not explain why a per use license, with ASCAP setting the rates, would be any the less "price-fixing" than a blanket license—nor why, if the members set the rates, the per use license would offer anything more than, or different from, that which the individual members offer today.

Following the decision, defendants applied unsuccessfully for rehearing, and now file this petition.

Reasons for Granting the Writ

I.

The decision below will create major problems of judicial administration and turmoil in music licensing.

The most basic reason for granting the writ is that the errors of the court below are so significant that, unless corrected, they will create major problems of judicial administration and will create turmoil in the music licensing business for years to come.

The Errors

The court below erred in at least three respects: it held to be price-fixing and copyright misuse conduct which had never before been so perceived; it applied the label of *per se* illegality based on assumptions of fact contradicted by the undisturbed findings of the District Court; and then it set at naught the entire concept of *per se* illegality by creating a "market necessity" exception.

The Court viewed ASCAP and all other common sales agencies which set package prices as falling within the ban of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150,

221 (1940), against "[a]ny combination which tampers with price structures."

Neither *Socony-Vacuum* nor any other authority requires or supports this extreme result.

ASCAP, in making available the blanket license, does not tamper with price structure and does not engage in price-fixing. For it is the essence of price-fixing that the price-fixers "fix"—that they agree either (a) to observe the established prices and not to compete with each other in price terms, or (b) to engage in conduct, as in *Socony-Vacuum*, the purpose and necessary effect of which is to fix and maintain prices. (Price-fixers may, of course, waltz on their agreements, and often do, but it is the agreement which is the essence of the wrong.) ASCAP's members undertake no such commitment: according to the findings of the District Court, they stand ready and willing to deal individually with CBS or anyone else and to negotiate prices quite unrelated to ASCAP's blanket license. This being so, there is no tampering with price structure, no price-fixing as that term has ever before been used by any court.

In reaching its result, the Second Circuit did not cite and certainly did not consider this Court's teaching in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977):

"*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive."

This test was reaffirmed only last month in *National Society of Professional Engineers v. United States*, 46 U.S. L.W. 4356, 4359 (U.S. April 25, 1978), where the Court said that agreements are *per se* illegal only when their "nature

and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.”

Here, we had an eight-week trial at which the industry was studied in every detail. The District Court found, on that full record, that ASCAP’s members were both willing and able to compete—all CBS had to do was ask.

These findings do not permit—they refute—a ruling of *per se* illegality.

Common sales or buying agencies, and other arrangements among competitors which are really anticompetitive, unlike the ASCAP blanket license, have been held permissible under the Rule of Reason—and so not *per se* illegal. *Associated Press v. United States*, 326 U.S. 1 (1945); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); *In re Associated Greeting Card Distributors, et al.*, 50 F.T.C. 631 (1954); see Bork, *The Antitrust Paradox* 263-7 (1978); L. Sullivan, *The Law of Antitrust* 207-8, 298 (1977).

Under these authorities, the Second Circuit was clearly wrong in measuring ASCAP’s activities by a *per se* test rather than the Rule of Reason.

Nor did the Second Circuit satisfactorily answer the District Court’s position that *Automatic Radio* and *Zenith Radio*, read together, teach that package licensing agreements are lawful when made for the convenience of the parties, without coercion. The Court of Appeals claimed to find a distinguishing feature in the fact that “these were cases in which a single trader, Hazeltine, owned and licensed all the patents involved”—by contrast with ASCAP, which licenses on behalf of its many members, who separately own their copyrights. But this is a distinction with-

out a real difference: surely Hazeltine had acquired its patents by assignment from the original patentees, and surely it makes no sense, economic or legal, to penalize ASCAP’s members for not assigning their copyrights to ASCAP.

The court below tried to find support for its “market necessity” exception to *per se* illegality in a memorandum submitted to this Court by the Solicitor General in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968) (discussed *infra*, pp. 20-22). The Solicitor General, urging this Court not to review the Ninth Circuit’s decision that ASCAP’s conduct was lawful, said this:

“The Sherman Act has always been discriminat-
ingly applied in the light of economic realities. There
are situations in which competitors have been per-
mitted to form joint selling agencies or other pooled
activities, subject to strict limitations under the anti-
trust laws to guarantee against abuse of the collec-
tive power thus created.”

Memorandum of the United States as Amicus Curiae at 10-11 (No. 67-147, 1967 Term). To us, this is an invocation of the Rule of Reason, not of any doctrine of *per se* illegality with a “market necessity” out.*

There is the strongest reason to conclude, then, that the Second Circuit erred in holding the ASCAP blanket license both *per se* illegal and a misuse of copyrights.

Impact on Antitrust Cases

Consideration and correction of these errors is required, we submit, not only in the interest of the parties but also because of the impact the decision will have on other cases.

* If there be any doubt, we would urge the Court to ask the Solicitor General for his views in this case, as was done in *K-91*, 389 U.S. 805 (1967).

First, the decision represents an expansion of the doctrine of *per se* illegality—by one of the nation's most active antitrust courts—when this Court has indicated that the doctrine is to be applied only with great care. The result can only be confusion.

Further, the Second Circuit's ruling casts a shadow over every common selling agency which establishes package prices. Many examples occur, but one particularly close to home is the CBS television network: it is a common selling agent of advertising time for its 200 local stations and, simultaneously, a common buying agent of programs for performance on those stations. As buyer and as seller, the network—not the individual station—negotiates the package fee. If ASCAP's blanket license is unlawful despite the members' willingness to negotiate individually, then equally unlawful are CBS' operation and the operations of the other national networks, despite the affiliates' freedom to refuse a network program and to deal directly with an advertiser or a program supplier.

And equally unlawful are all common selling agencies which sell packages, the components of which come from different sources.

"Market Necessity"

The Second Circuit added to the confusion its decision would otherwise have created by its espousal of a "market necessity" exception to the rule that price-fixing agreements are *per se* illegal. Of course this was dicta, but it was carefully and extensively considered dicta and, unless corrected, is likely to have pernicious effects. The notion that some price-fixing is "good" is bound to be seized upon as a defense by price-fixing defendants generally. Nor will it make a difference that few defendants, if any, will

be able to make the defense stand up—under the decision below, the defense will be an appropriate subject for litigation, thereby frustrating the effort toward judicial economy which the *per se* rules embody.

The two major law reviews which have commented on this case could hardly have been more critical of the "market necessity" exception. Said a Yale casenote, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 799 (1978):

"The market function exception created in *CBS* threatens to swallow the *per se* rule. The exception to the *per se* rule would force the courts to examine the anatomy of the market in every case where the defense is raised, thus defeating the simplifying purpose of *per se* rules."

Harvard said, *The Middleman as Price Fixer*, 91 Harv. L. Rev. 488, 498 (1977):

"The court offers no guidance for interpreting the concept of market necessity. In particular, it fails to distinguish between cases where the pricing effect is merely ancillary to a necessary activity, and those where the price fixing itself is claimed to be necessary for some purpose. The market necessity exception may therefore lend credence to those general defenses of price fixing that have long been excluded—and properly so—by the *per se* rule."*

* Harvard thought the entire decision untenable. Typical is this observation, *id.* at 497:

"The court's need to create an exception to the price-fixing rule clearly reveals the deficiencies in its view of price fixing. Not only does the recognition of any such exception run contrary to the basic idea of a *per se* rule, but the fact that the blanket license is absolutely necessary in some circumstances suggests that it is not *inherently* harmful at all" (emphasis in original).

Yale thought the blanket license unlawful, but so clearly desirable that it should be legalized by legislation.

Impact on the Music World

The decision below holds particular menace, of course, for the music licensing world. The blanket license, because of its convenience and simplicity, is used in all countries which recognize copyright. But the Court of Appeals has declared that the entire artistic and economic community of music writers and publishers in this country and the rest of the world—from Aaron Copland to Roberta Flack to Sir Ralph Vaughan Williams to Edith Piaf—are price-fixers and guilty of copyright misuse because of their membership in, or relation to, ASCAP.

In these circumstances, everyone will be at total disadvantage. ASCAP and its members will be able to issue a blanket license only on peril that the licensee will later denounce the license: he may claim, like CBS, that no "market necessity" existed for the blanket license he requested and signed, that it was therefore *per se* illegal, that the copyrights involved have been misused and accordingly are unenforceable, and that he is entitled to treble damages.

There are problems not only for ASCAP and its members, but for the user of music as well. Users are willing, we may assume, to pay a fair price for the right to perform music. They have always wanted the convenience of the blanket license—why should they not have it?

But should ASCAP and its members continue to make the blanket license available? Should they run the risk of the licensee's later discovery, on the advice of counsel, that he has been a victim of *per se* illegality?

To call this situation turmoil is, we submit, to understate.

The Burden on the Courts

The turmoil must surely impact upon the courts. Until the Second Circuit's ruling, the legal affairs of the music licensing world were conducted with economy of judicial time. True, the District Court for the Southern District of New York had continuing responsibility under the ASCAP Amended Final Judgment for supervision of ASCAP's affairs. But the expenditure of judicial energies over the years has been modest: the mere existence of the court as an ultimate rate-fixing authority resulted in the settlement of every rate-fixing proceeding ever instituted.

Under the Second Circuit's ruling here, however, a plethora of litigation seems inevitable. Even though the Second Circuit decision is directed only to television networks, every user of ASCAP music will be encouraged to assert—in a plenary antitrust action whenever and wherever he chooses—that the federal court he chooses must devise a "per use" license for him and that he need pay nothing for what he has freely used.

This is no exercise in speculation. Such claims have already been asserted by local television and radio stations asserting their entitlement to special licenses because the ASCAP blanket license violates the antitrust laws. More such actions (and counterclaims to infringement actions) must surely be expected—involving not only broadcasters but other users of ASCAP music who share a common characteristic: a curiosity to find out in court whether they can really get something for nothing.

In the interest, then, of economy of judicial administration; as well as of the reasonable enjoyment and use of music copyrights, the decision below requires review.

II.

The decision below conflicts with decisions of the Ninth Circuit.

The majority decision below is in direct conflict with two decisions of the Ninth Circuit, *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (1967), *cert. denied*, 389 U. S. 1045 (1968); and *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on decision below*, 541 F.2d 226 (1976), *cert. denied*, 430 U.S. 915 (1977).

K-91 holds squarely that ASCAP's blanket license is not illegal price-fixing. And *Cook Paint* holds that *Socony-Vacuum* does not really mean that every agreement which has any conceivable impact on price is *per se* illegal—any more than every agreement which in any way restrains trade is a violation of Section 1 of the Sherman Act. See *National Society of Professional Engineers v. United States*, 46 U.S.L.W. 4356 (U.S. April 25, 1978); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This Court should grant certiorari, we submit, to resolve the conflict of circuits thus presented.

In *K-91*, ASCAP members sued a radio broadcaster for copyright infringement and won. Defendant argued that ASCAP was an unlawful price-fixer; the Ninth Circuit disagreed.

The Second Circuit, in the case at bar, said that it had no quarrel with the Ninth Circuit's "result" in *K-91*—there was a "market necessity" for the blanket license in the case of the *K-91* radio broadcaster, said the Second Circuit, and so the price-fixing by ASCAP in the blanket license could be justified.

But that is not the route which the Ninth Circuit took. The Ninth Circuit said, rather, that ASCAP did no price-

fixing: since the ASCAP offer of a blanket license was subject to judicial determination, under the Amended Final Judgment, of the reasonable fee for that license, ASCAP was not the "price fixing authority," 372 F.2d at 4.

The Ninth Circuit held on still another score that ASCAP's conduct was lawful, 372 F.2d at 4:

"There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

Thus, in the Second Circuit, ASCAP is a price-fixer; in the Ninth Circuit it is not. In the Second Circuit, the willingness of ASCAP's members to deal individually does not save them from a charge of illegal combination; in the Ninth Circuit it is exculpation.

This is conflict.

The Circuits are at odds also on the proper scope of *Socony-Vacuum*. The Second Circuit, as we have seen, treats the case as making illegal *per se* any action which in any way "tampers with price structures." The Ninth Circuit, in *Cook Paint*, took a position far more consistent with this Court's view of the proper role of the *per se* doctrine. There, plaintiffs attempted to challenge under the antitrust laws defendants' cooperative advertising campaign. The advertising contained misrepresentations, said plaintiffs, and the necessary consequence of these falsehoods was to raise prices—which plaintiffs, relying on *Socony-Vacuum*, asked the trial court to hold illegal *per se*. The trial court (Renfrew, J.) refused, saying that price-fixing is only that conduct "whose actual purpose is to affect or regulate prices," 391 F. Supp. at 967. The Ninth Circuit affirmed on the opinion below.

In the Ninth Circuit, then, it is not illegal *per se* under the Sherman Act to combine in a false advertising campaign—it may not be praiseworthy conduct, but it is not price-fixing. In the Second Circuit, by contrast, the mere offer of a bundle of products at a package price is price-fixing and is *per se* unlawful, without the slightest proof that the sellers ever conceived—or that there would be in fact—any effect on price.

This divergence of view on the proper scope of *per se* illegality calls for this Court's reconciliation.

Conclusion

There remain two final reasons why this Court should intervene in this case now to set matters aright.

First, there is a basic unreason in the assumption that antitrust doctrine which makes sense in dealing with steel and widgets will necessarily make equal sense and produce results equally desirable when we attempt to apply it to the behavior of those who create and perform music. Do composers compose only for money—or because, like poets, they have little choice? Will they behave like economic man in negotiating prices for the performance of their music—or will they sell performing rights at almost any price, for the pleasure of hearing their works performed? And even the iron-fisted CBS producer—will he use the composition he can get for \$699.50 or will he pay \$850 because there is a bit of the artist in him too?

These questions have no answers of which we are aware. They suggest only that it is probably appropriate to go slow in applying *per se* rules of illegality to the arts—just as, in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 788-89, n.17 (1975), this Court said that “[t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act.”

Finally, we submit, this Court should intervene now because this case has already taken up far too much court time in a controversy which seems almost to have come from the theatre of the absurd. We are here, after all, in this context:

CBS says it does not want an ASCAP blanket license.

ASCAP offers only the blanket license.

CBS could get all the licenses it needs from ASCAP's members, if only it would ask.

CBS has never asked.

Therefore, according to the court below, CBS has the right to continue to burden the courts with this eight-year-old litigation in order to compel ASCAP to offer to CBS a “per use” license which no one has ever seen and which CBS may well decide not to take when it sees what it is.

We hope this Court will disagree.

We ask this Court to grant certiorari and, upon that grant, to vacate the decision of the Court of Appeals and reinstate the judgment of the District Court dismissing the complaint.

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Respectfully submitted,

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